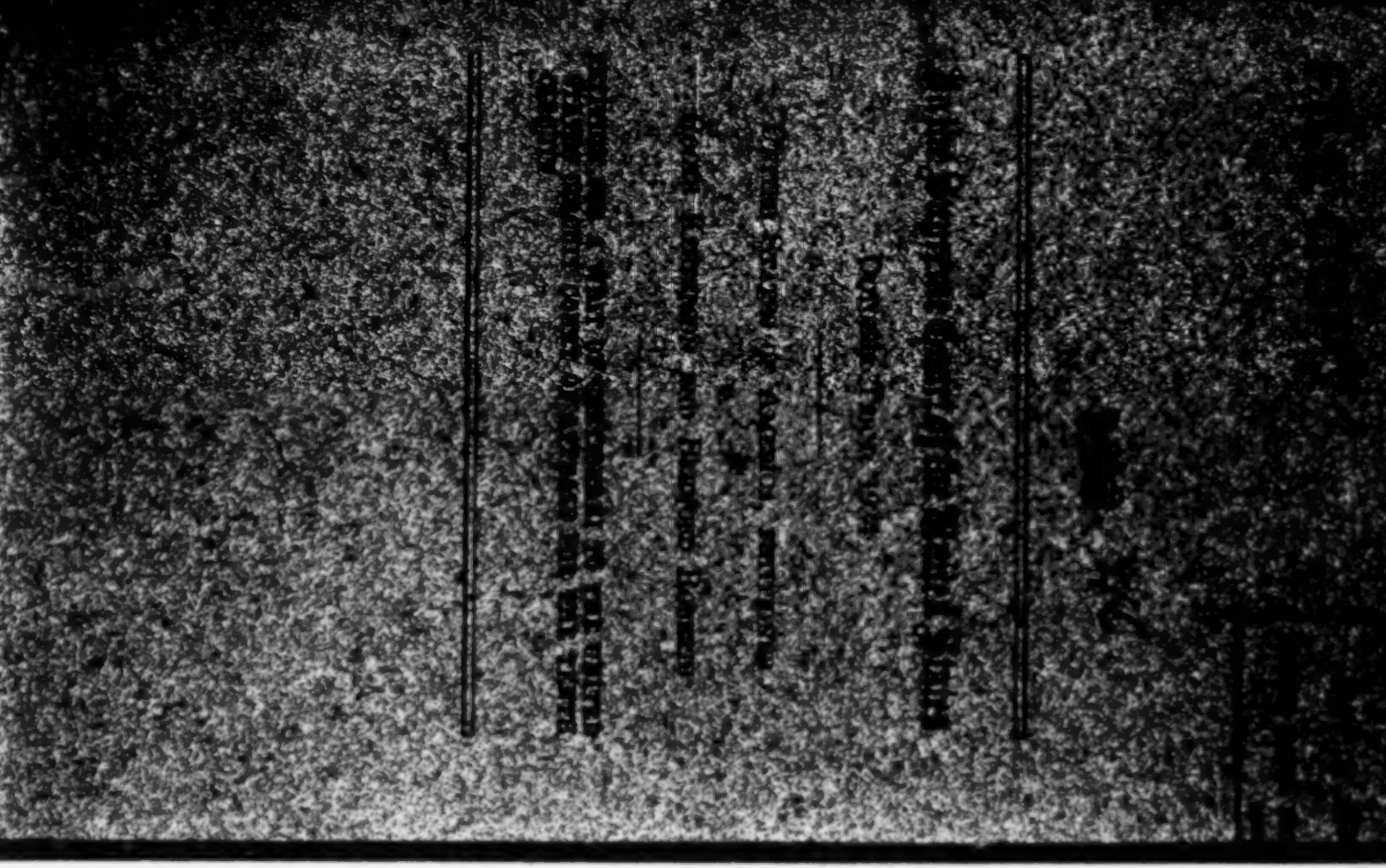

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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

ROGER KESTERSON AND BERNORD ROBERTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Tenth Circuit, entered in the above case on April 8, 1935 (R. 18), reversing a judgment of the United States District Court for the Northern District of Oklahoma.

OPINIONS BELOW

The opinion of the District Court (R. 3–5) is reported in 8 F. Supp. 680. The opinion of the Circuit Court of Appeals (R. 13–18) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 8, 1935 (R. 18). The juris-

diction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Rule 11 of the Rules of Practice and Procedure with Respect to Proceedings in Criminal Cases after Verdict or Finding of Guilt, promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether Section 701 of the Revenue Act of 1926 (c. 27, 44 Stat. 9, 95, U. S. C. App. Title 26, Sec. 206), imposing a special excise tax of $1,000 on persons carrying on the business of a brewer, distiller, wholesale or retail liquor dealer, wholesale or retail dealer in malt liquor, or manufacturer of stills, in any place where such business is prohibited by the law thereof, is valid, in view of the repeal of the Eighteenth Amendment.

STATUTES INVOLVED

Section 701 of the Revenue Act of 1926 will be found in the Appendix, *infra*, p. 5.

STATEMENT

On October 5, 1934, the United States grand jury for the Northern District of Oklahoma returned an indictment charging that the respondents on August 17, 1934, carried on the business of a retail liquor dealer in that district, contrary to the laws of the State of Oklahoma, without having paid the special excise tax provided by Section 701 of the Revenue Act of 1926 (R. 1).

On November 9, 1934, the respondents filed a demurrer to the indictment on the grounds that Section 701 was unconstitutional, in that it violated the provisions of Article I, Section 8, Clause 1 of the Constitution requiring that all duties, imposts, and excises be uniform throughout the United States, and in that the "excise tax therein provided for is in the nature of penalty, and not for the purpose of raising revenue, in connection with matters over which the Congress has no authority to legislate" (R. 2).

The District Court overruled the demurrer (R. 5), stating (R. 4)—

> It would appear that the subject of the tax is that of a retail liquor dealer in a state or place within the state where such business is rendered illegal under the laws of the state. The taxes imposed are upon an unlawful business and operate uniformly throughout the United States, where such unlawful business is engaged in.

The respondents then each pleaded *nolo contendere*. Kesterson was sentenced to serve six months in jail and to pay a fine of $500. Roberts was sentenced to serve ninety days in jail and to pay a fine of $100 (R. 6).

The respondents appealed to the Circuit Court of Appeals for the Tenth Circuit, which reversed the judgments of conviction (R. 13–18).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that Section 701 "was prescribed as a regulatory measure to provide an additional penalty * * * to aid in the suppression of dealing in liquor, a subject over which Congress has had no power since the repeal of the Eighteenth Amendment."

2. In holding that Section 701 imposes not an excise tax but a penalty dealing with a subject left or committed by the Constitution to the control of the States.

3. In reversing the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

The reasons for granting the writ in this case are the same as those advanced in the Government's petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit in the case of *United States of America, Petitioner,* v. *Gus L. Constantine, alias Dr. Gus,* No. 938, filed on May 2, 1935, and are therefore not repeated here.

For the reasons urged in that petition, it is respectfully submitted that the present petition should be granted.

STANLEY REED,
Solicitor General.

MAY 1935.

APPENDIX

Section 701 of the Revenue Act of 1926 (U. S. C. App., Title 26, Sec. 206) provides that—

> On and after July 1, 1926, there shall be levied, collected, and paid annually, in lieu of the tax imposed by section 701 of the Revenue Act of 1924, a special excise tax of $1,000, in the case of every person carrying on the business of a brewer, distiller, wholesale liquor dealer, retail liquor dealer, wholesale dealer in malt liquor, retail dealer in malt liquor, or manufacturer of stills, as defined in section 3244 as amended and section 3247 of the Revised Statutes, in any State, Territory, or District of the United States contrary to the laws of such State, Territory, or District, or in any place therein in which carrying on such business is prohibited by local or municipal law. The payment of the tax imposed by this section shall not be held to exempt any person from any penalty or punishment provided for by the laws of any State, Territory, or District for carrying on such business in such State, Territory, or District, or in any manner to authorize the commencement or continuance of such business contrary to the laws of such State, Territory, or District, or in places prohibited by local or municipal law.
>
> Any person who carries on any business or occupation for which a special tax is imposed by this section, without having paid such special tax, shall, besides being liable for the payment of such special tax, be subject to a penalty of not more than $1,000 or to imprisonment for not more than one year, or both.

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No. 46

In the Supreme Court of the United States

OCTOBER TERM, 1935

THE UNITED STATES OF AMERICA, PETITIONER

v.

ROGER KERFERSON AND BERNORD ROBERTS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 46

THE UNITED STATES OF AMERICA, PETITIONER

v.

ROGER KESTERSON AND BERNORD ROBERTS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 2–4) is reported in 8 F. Supp. 680. The opinion of the Circuit Court of Appeals (R. 9–14) is reported in 76 F. (2d) 913.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 8, 1935. (R. 14.) The petition for a writ of certiorari was filed May 8, 1935, and was granted October 14, 1935. (R. 14.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act

of February 13, 1925, and under Rule XI of the Rules of Practice and Procedure With Respect to Proceedings in Criminal Cases after Verdict or Finding of Guilt, promulgated by this Court May 7, 1934, and effective September 1, 1934, the finding of guilty by the trial court having been rendered November 9, 1934. (R. 5.)

QUESTION PRESENTED

Whether Section 701 of the Revenue Act of 1926, imposing a special excise tax of $1,000 on persons carrying on the business of a brewer, distiller, wholesale or retail liquor dealer, wholesale or retail dealer in malt liquor, or manufacturer of stills, in any place where such business is prohibited by the law thereof, became invalid with the repeal of the Eighteenth Amendment, where the business was carried on contrary to State law.

STATUTE INVOLVED

Section 701 of the Revenue Act of 1926 (c. 27, 44 Stat. 9, 95; U. S. C. A., Title 26, Secs. 206, 192) is set forth in the Government's brief in *The United States of America* v. *Gus L. Constantine, alias Dr. Gus,* No. 40 on the docket of this Court, which is to be heard immediately preceding the argument of this case. The statute will therefore not be repeated here.

STATEMENT

On October 5, 1934, the United States grand jury for the Northern District of Oklahoma re-

turned an indictment charging that the respondents did, on August 17, 1934, "engage in and carry on the business of a retail dealer in intoxicating liquors, contrary to the laws of the State of Oklahoma by then and there have [having] and possessing for retail sales certain intoxicating liquor, to wit: Fifty-four Pints of Whiskey, at a place, to wit: at 1115 South Main Street in the city of Tulsa * * * without having paid the special excise tax of $1,000 therefor, as required by the provisions of section 206, title 26, U. S. C. A." (R. 1–2.)

On November 9, 1934, the respondents filed a demurrer to the indictment on the ground that Section 701 is unconstitutional (1) in that it violates the provisions of Article I, Section 8, Clause 1 of the Constitution requiring that all duties, imposts, and excises be uniform throughout the United States, and (2) in that the "excise tax therein provided for is in the nature of penalty, and not for the purpose of raising revenue, in connection with matters over which the Congress has no authority to legislate." (R. 2.)

The demurrer was overruled, with exceptions allowed the respondents. (R. 4–5.) From an opinion rendered by the District Court it appears that the respondents' principal contention was that the provisions of the statute here involved, requiring the payment of a special excise tax of $1,000 in States where the carrying on of the businesses specified is prohibited, violate the uniformity provision of

the Constitution, "because the 'rate' or 'amount' of an excise must be the same throughout the United States, and must operate throughout the United States uniformally from a geographical standpoint, for the reason the excise must be for the same amount or at the same rate in every state in the union wherein the subject of the excise may be found." The court pointed out that the subject of the tax was not alone that of the business of a retail dealer, but that of a retail dealer in a State or place within the State where such business is rendered illegal by the laws of the State, and that the tax applies uniformly throughout the United States wherever such unlawful business is engaged in. Among other cases, the court referred to *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311, where the Webb-Kenyon Act, prohibiting the shipment of liquor into any State to be there used in violation of the laws thereof, was sustained by this Court, as against the objection that it was not uniform in operation, because (p. 327) "The act uniformly applies to the conditions which call its provisions into play."

The District Court concluded (R. 4)—

> that the Act operates uniformally upon the subject of the tax, that is, wherever the unlawful business of a retail liquor dealer is carried on, and that the Act meets all necessary constitutional requirements.

The court did not specifically discuss the question whether the statute prescribed a tax or a penalty,

and it does not appear from its opinion whether that point was pressed.

Upon the overruling of the demurrer, the respondents pleaded *nolo contendere*. The trial was to the court, which found the respondents guilty as charged. Kesterson was sentenced to six months in jail and to pay a fine of $500. Roberts was sentenced to serve ninety days in jail and to pay a fine of $100. (R. 5.)

The respondents appealed to the Circuit Court of Appeals for the Tenth Circuit, which reversed the judgments of conviction on the ground that the levy imposed by Section 701 was a penalty and not a tax under the principles laid down in the *Child Labor Tax Case*, 259 U. S. 20; *Hill* v. *Wallace*, 259 U. S. 44; and *Lipke* v. *Lederer*, 259 U. S. 557. The court did not pass upon the first issue raised in the demurrer relative to the purported lack of uniformity. (R. 9–14.) On October 14, 1935, this Court granted the Government's petition for a writ of certiorari and assigned the case for argument immediately following No. 40, *The United States of America* v. *Gus L. Constantine, alias Dr. Gus*, in which the same questions are involved.

SPECIFICATIONS OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that Section 701 "was prescribed as a regulatory measure to provide an additional penalty * * * to aid in the suppression of